Filed 9/21/06 Weissman v. Sup. Ct. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PHYLLIS B. WEISSMAN,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

PAMELA MACDONALD,

Real Party in Interest.

No. B190030
(Super. Ct. No. BC325419)

ORIGINAL PROCEEDING; petition for writ of mandate. Ernest M. Hiroshige, Judge. Petition granted; peremptory writ issued.

Horvitz & Levy, Barry R. Levy and H. Thomas Watson; Garrett & Tully, Robert Garrett, Thomas A. Ortiz and Rosa Martinez for Petitioner.

No appearance for Respondent.

Knapp, Petersen & Clarke and Kevin J. Stack for Real Party In Interest.

Attorney Phyllis Weissman challenges the trial court's denial of her motion for summary judgment in this malpractice action filed against her by her former client Pamela MacDonald. Weissman contends the action is barred as a matter of law by the one-year statute of limitations set forth in Code of Civil Procedure section 340.6.[1] We agree. Based on undisputed facts in the record, it is clear Pamela MacDonald sustained actual injury and discovered or should have discovered the facts constituting the wrongful act or omission alleged in her malpractice cause of action more than one year before she filed suit. Accordingly, we direct the trial court to vacate its order denying Weissman's summary judgment motion and to issue an order granting the motion.

FACTS AND PROCEEDINGS BELOW

In May 1990, Pamela and Gary MacDonald were married.[2] In November 2001, Gary passed away. The beneficiaries of the Gary MacDonald Family Trust (the trust) were Pamela, on the one hand, and Gary's adult children from a prior marriage, on the other hand. The trust contained a no contest clause stating, in pertinent part: "If any beneficiary under this trust . . . contests in any court the validity of this trust . . . or seeks to obtain an adjudication in any proceeding in any court that this trust or any of its provisions . . . is void, or seeks otherwise to void, nullify, or set aside this trust or any of its provisions, then that person's right to take any interest given to him or her by this trust shall be determined as it would have been determined if the person had predeceased the execution of this declaration of trust without surviving issue."

Pamela retained Phyllis Weissman to represent her in trust and probate litigation against Gary's adult children. A dispute arose concerning ownership of the funds in Gary's 401k account. Counsel for the trustee of the trust filed a petition with the court to

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[1] Further statutory references are to the Code of Civil Procedure.

[2] To avoid confusion, we often will refer to members of the MacDonald family by their first names.

determine ownership. The trustee came to the conclusion the funds belonged to Pamela and not the trust. Before the probate court could rule on the trustee's petition, Pamela and Gary's children settled the dispute.

Another dispute arose concerning ownership of funds in Gary's IRA account. The trustee and his attorney concluded the funds belonged to Pamela. They informed Weissman they would not object if she asserted this position in court. On August 8, 2002, Weissman filed on behalf of Pamela a petition asking the court to determine Pamela was entitled to collect the funds in the IRA. Gary's daughter Amy MacDonald opposed the petition, contending the IRA belonged to the trust.

Weissman informed Pamela she intended to retire. On January 17, 2003, Weissman signed a substitution of attorney form in the trust matter. Philip Kelly & Associates substituted in as Pamela's new counsel. On January 21, 2003, the probate court issued an order stating the IRA was an asset of the trust. On January 24, 2003, Kelly filed the substitution of attorney form in the trust matter.[3]

On June 20, 2003, Amy filed a declaratory relief petition under the "safe harbor" rule set forth in Probate Code section 21320, asking the court if she would violate the trust's no contest clause if she filed an application seeking a determination Pamela had violated the no contest clause when she filed her August 8, 2002 petition concerning the IRA. Amy asserted Pamela had made a "fatal error in failing to seek declaratory relief before she filed her petition claiming ownership of the Trust's [IRA]." Amy's proposed application contended "Pamela has forfeited all right to take under the Trust." On July 2, 2003, Amy personally served a copy of her declaratory relief petition and proposed application on Weissman and Pamela's attorney of record, Philip Kelly. Pamela retained new counsel, the law firm of Knapp, Petersen & Clarke, to oppose Amy's petition. By July 7, 2003, Pamela had begun incurring attorney fees in connection with Amy's petition.

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[3] On January 16, 2003, Pamela signed a substitution of attorney form in the estate matter, indicating she planned to represent herself in pro. per. Weissman signed the form on June 4, 2003 and filed it with the court on or about June 6, 2003.

On August 15, 2003, the court issued an order stating Amy would not violate the trust's no contest clause if she filed her application seeking a determination Pamela had violated the no contest clause when she filed her August 8, 2002 petition concerning the IRA. On September 8, 2003, attorney Kevin Stack from the law firm of Knapp, Petersen & Clarke filed a substitution of attorney form indicating his firm was now counsel of record for Pamela in the trust matter. The same day his firm filed on behalf of Pamela an opposition to Amy's application.

Pamela's opposition argued she should not forfeit her inheritance under the trust because she filed the petition concerning the IRA "at the suggestion of the attorney for the trustee . . . and only took positions consistent with the Trustee." The opposition also asserted Gary "clearly did not intend for a petition to clarify ownership of an asset which amounts to a very small fraction of the estate to result in the forfeiture of his wife's inheritance." The trustee submitted a declaration in support of Pamela's opposition stating he did not "interpret the filing of [the August 8, 2002 petition concerning the IRA] to be a contest of the trust itself."

Amy filed a response to Pamela's opposition stating Pamela's "failure to first seek the safe harbor protection of Probate Code § 21370 [*sic*] is inexcusable." Amy also stated Pamela could be compensated in a legal malpractice action for any damages she sustained by virtue of violating the no contest clause and forfeiting her interest under the trust.

On October 1, 2003, the court heard oral argument on Amy's application and took the matter under submission. By October 22, 2003 Pamela had incurred $19,525.16 in attorney fees and costs in litigating Amy's claim she had violated the trust's no contest clause. On December 5, 2003, the court ruled Pamela's August 8, 2002 petition concerning the IRA was a contest within the meaning of the trust's no contest clause and Pamela therefore forfeited her interest under the trust.[4]

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[4] On February 3, 2004, Pamela appealed from this ruling. On March 14, 2005, Division Four of this appellate district issued its opinion affirming the December 5, 2003

On December 3, 2004, Pamela filed this malpractice action against Weissman. Pamela asserted Weissman "failed to exercise reasonable care, skill, and diligence, and [was] negligent and careless in" representing Pamela in the trust matter. Pamela alleged Weissman's wrongful acts and omissions consisted of "failing to file a declaratory petition to determine that proposed actions were not in violation of the no-contest clause, failing to properly advise [Pamela] of the ramifications of pursuing actions in the underlying matters, . . . improperly bringing a petition to determine the ownership and entitlement to the assets and proceeds of an IRA, failing to keep [Pamela] informed of developments in the matters, and/or failing to take such other and/or further actions as were reasonably necessary to protect [Pamela]'s interests." Pamela claimed, as a result of Weissman's malpractice, Pamela "forfeited interests in the trust pursuant to a court ruling dated December 5, 2003," incurred attorney fees and costs in the trust matter "attempt[ing] to correct the wrongs done by [Weissman]," and sustained other damages.

Weissman answered the complaint and asserted several affirmative defenses, including a statute of limitations defense. About 10 months later, Weissman filed a motion for summary judgment, contending Pamela's action was barred by the one-year statute of limitations set forth in section 340.6. Weissman asserted the limitations period expired on July 2, 2004, five months before Pamela filed her malpractice action on December 3, 2004. According to Weissman, Pamela sustained an actual injury at the time Weissman filed the August 8, 2002 petition concerning the IRA in violation of the trust's no contest clause, because Pamela effectively forfeited her interest in the trust at that time. Weissman claimed Pamela sustained further injury no later than July 2, 2003 when she was served with Amy's petition contending she had violated the trust's no contest clause, and she was forced to incur attorney fees and costs in opposing the petition. Weissman argued Pamela discovered or should have discovered the facts supporting her malpractice claim against Weissman no later than July 2, 2003 when she

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ruling finding Pamela had violated the trust's no contest clause. (*MacDonald v. MacDonald* (Mar. 14, 2005, B173511) [nonpub. opn.].)

was served with Amy's petition, which asserted she had made a "fatal error" in failing to seek declaratory relief before she filed her petition concerning the IRA.

In opposition to the summary judgment motion, Pamela submitted a declaration stating she did not know Weissman did anything wrong until she received the court's December 5, 2003 ruling stating she had contested the trust and therefore had forfeited her interest under the trust. Before that time, Pamela knew the trustee and the trustee's attorney did not believe Pamela's petition concerning the IRA was a contest. Because the petition was filed at the suggestion and with the support of the trustee, Weissman did not believe Pamela's petition was a contest either.

Pamela stated her receipt of Amy's petition did not cause her to suspect any wrongdoing on the part of Weissman. The attorney Pamela retained to oppose Amy's petition argued Pamela did not violate the trust's no contest clause, and the trustee submitted a declaration supporting Pamela's position. Moreover, Pamela asserted she had good reason not to believe contentions Amy made in the trust litigation. In her declaration Pamela explained, during the course of the trust and probate proceedings, Amy's attorney had made false accusations against Pamela. For example, Amy's attorney claimed Pamela had seduced a beneficiary's husband based on the fact Pamela had suggested the beneficiary's husband as a potential president for MacDonald Carbide (Gary's business). Amy's attorney also claimed Pamela had absconded with life insurance proceeds when in fact she had turned them over to an attorney who was involved in the preparation of the trust.[5] For these reasons, Pamela contends her adversary's assertion she made a "fatal error" in failing to file a declaratory relief petition before she filed her petition concerning the IRA did not cause and should not have caused her to discover Weissman did something wrong.

In opposition to the summary judgment motion, Pamela also contended she did not sustain actual injury until December 5, 2003 when the court ruled she had violated the trust's no contest clause and thereby forfeited her interest under the trust. It was at that

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[5] Weissman does not dispute Amy's attorney made these accusations. Nor does Weissman dispute these accusations were false.

time she lost her interest in her home and the family business. Pamela argued the attorney fees and costs she incurred in opposing Amy's petition constituted a "nominal and trivial damage" which did not trigger the statute of limitations. She noted "she was already involved in litigation in both the trust and probate proceedings."

In connection with her reply brief, Weissman submitted excerpts from the transcript of Pamela's deposition taken in this action.[6] Pamela stated she was aware of the no contest clause in the trust before she received Amy's petition. In fact, earlier Pamela had "suggested" to Weissman that Gary's children had contested the trust by trying to take all of the money from Gary's 401k account. Weissman told Pamela she had consulted with other attorneys and believed the court might find Pamela to be in violation of the trust's no contest clause if she challenged the actions of Gary's children with respect to the 401k. Pamela was not aware a party could ask the court in advance whether a petition would violate the no contest clause.

At her deposition Pamela also testified the trustee called her in June or July 2003 and told her about the petition Amy had filed. The trustee informed Pamela the petition stated she had contested the trust because a "particular document was not filed." According to Pamela, the trustee indicated the petition "didn't make any sense to him." Pamela believed Amy and her attorney had "found a loophole." Pamela thought to herself: "'Why didn't somebody tell me I had to file this[?]'" She believed it was something she "had to personally do." Pamela did not think about whether Weissman had made a mistake or had failed to do something she should have done. Pamela

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[6] Weissman filed her motion for summary judgment on December 9, 2005, but she did not take Pamela's deposition until January 25, 2006. At the hearing on the summary judgment motion, Pamela's counsel made a passing objection to evidence Weissman submitted in connection with her reply brief, presumably including the excerpts from the transcript of Pamela's deposition. Counsel did not request a ruling on the objection and the trial court did not make one. Accordingly, the objection is "deemed waived and not preserved for appeal." (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 358-359, footnotes 1 and 2; *Ann M. V. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, footnote 1.) A trial court has discretion to consider evidence first submitted in connection with a reply brief in support of a motion for summary judgment. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 310, 312, 315-316.)

thought: "[W]ith them saying I contested the trust, I would lose my house, my furniture, my income, my shares of Mac Donald [*sic*] Carbide stock." Within a few days of her conversation with the trustee, Pamela received a copy of Amy's petition from the trustee. Pamela stated: "When I received the petition, I knew I needed an attorney." Pamela retained her current counsel.

On August 6, 2003, Pamela sent Weissman a copy of Amy's petition with a letter, stating in pertinent part: "Well, Ebiner [Amy's attorney] and Amy are at it again. This time they are trying to convince the court that I contested the trust so that I will lose my shares of MacDonald and my home. . . . [¶] . . . Kevin [Pamela's new counsel] told me that the declaratory relief that was not filed when we sought the IRA – the basis of their petition – can be filed retroactively. He also told me that Phil will inform the court that the trust was going to do exactly what you did and that we saved the trust time and money by our actions."

On March 3, 2006, the trial court heard oral argument on Weissman's motion for summary judgment and issued its order denying the motion. The court concluded Weissman did not establish Pamela's malpractice action is barred as a matter of law by the one-year statute of limitations set forth in section 340.6. The court found triable issues of material fact as to when Pamela suffered actual injury and when she should have discovered the facts supporting her malpractice claim.

Weissman timely filed her petition for writ on mandate.[7]

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[7] Section 437c, subdivision (m)(1).

DISCUSSION

I. STANDARD OF REVIEW

Summary judgment is proper where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.[8] In the trial court, a defendant "has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto."[9]

"We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]"[10] We view the evidence in the light most favorable to the opposing party. "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. 'Any doubts about the propriety of summary judgment . . . are generally resolved *against* granting the motion, because that allows the future development of the case and avoids errors.' [Citation.]"[11]

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[8] Section 437c, subdivision (c).

[9] Section 437c, subdivision (p)(2).

[10] *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.

[11] *Binder v. Aetna Life Insurance Company* (1999) 75 Cal.App.4th 832, 839.

II. THE MALPRACTICE ACTION IS BARRED AS A MATTER OF LAW BY THE ONE-YEAR STATUTE OF LIMITATIONS.

Weissman contends the trial court erred in denying her summary judgment motion because Pamela's malpractice action is barred as a matter of law by the one-year statute of limitations set forth in section 340.6. Pamela argues there are triable issues of material fact concerning when she discovered or should have discovered Weissman's wrongful act or omission and when she sustained actual injury. Pamela asserts Weissman did not establish the statute of limitations began to run more than one year before Pamela filed this action.

Section 340.6, subdivision (a) provides: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury; [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

A. Pamela Discovered or Should Have Discovered the Facts Constituting the Wrongful Act or Omission More Than One Year Before She Filed This Action.

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [T]he limitations period begins once the plaintiff '"'has notice or information of circumstances to put a reasonable person *on inquiry* . . . .'"' [Citations.]"[12] The statute of limitations is not tolled because the "plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action. Thus, if one has suffered appreciable harm and knows or suspects that professional blundering is its cause, the fact that an attorney has not yet advised him does not postpone commencement of the limitations period."[13] Under section 340.6, "'the one-year period is triggered by the client's discovery of "the facts constituting the wrongful act or omission," not by his discovery that such facts constitute professional negligence. . . .'"[14] "[I]n legal malpractice actions statute of limitations issues . . . are at base factual inquiries."[15] Only where reasonable minds can draw but one conclusion does the question become a matter of law.[16]

In her declaration in opposition to Weissman's summary judgment motion, Pamela asserted she did not know Weissman did anything wrong until she received the court's December 5, 2003 ruling stating she had contested the trust and therefore had forfeited her interest under the trust. While Pamela might not have *known for certain*

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[12] *Jolly v. Eli Lilly and Company* (1988) 44 Cal.3d 1103, 1110-1111; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 682, 685.

[13] *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898.

[14] *Village Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 42-43.

[15] *Adams v. Paul* (1995) 11 Cal.4th 583, 588.

[16] *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 436; *Jolly v. Eli Lilly and Company*, *supra*, 44 Cal.3d at page 1112.

Weissman did something wrong, she clearly was on *inquiry notice* of the alleged wrongdoing more than one year before she filed this malpractice action.

Pamela testified at her deposition, when the trustee called her in June or July 2003 and told her about the petition Amy filed (claiming Pamela had neglected to file a declaratory relief petition before she filed her petition concerning the IRA and had violated the trust's no contest clause), she thought: "'Why didn't somebody tell me I had to file this[?]'" During that same conversation with the trustee Pamela understood: "[W]ith them saying I contested the trust, I would lose my house, my furniture, my income, my shares of Mac Donald [*sic*] Carbide stock." At that point, Pamela was on inquiry notice that somebody had done something wrong to her. Somebody had failed to advise her of the consequences of filing the petition concerning the IRA without first filing a declaratory relief petition. Now she stood to lose millions of dollars, by her own account. With minimal investigation Pamela would have realized the only person who could be to blame was Weissman, her former attorney who advised her to file the petition concerning the IRA but did not tell her about the safe harbor rule.

When Pamela received a copy of Amy's petition a few days after her conversation with the trustee, she knew she needed to hire an attorney. She did. On August 6, 2003, she sent a copy of Amy's petition to Weissman with a letter explaining her new attorney's strategy for opposing Amy's petition. Pamela told Weissman her attorney would argue she did not violate the trust's no contest clause because the trustee was going to file a petition concerning the IRA to the extent she did not do so. Pamela also explained her new attorney said she could file retroactively the document Weissman did not file back in August 2002. Essentially Pamela told Weissman, "to the extent you made a mistake when you neglected to file a document, we can fix it."

By August 6, 2003, at the latest, Pamela discovered or should have discovered the wrongful act or omission alleged in her malpractice cause of action against Weissman. By that time she knew Weissman had not filed a certain document when she filed the August 2002 petition concerning the IRA. She knew that omission could cost her millions of dollars in benefits she might not receive under the trust. She knew her

attorney was strategizing about ways he could fix Weissman's failure to file the document -- either by trying to file the document retroactively or arguing the petition did not violate the trust's no contest clause. At that point, any reasonable person would have suspected her former attorney had made an actionable mistake. There is no triable issue of material fact here.

B. Pamela Sustained Actual Injury More Than One Year Before She Filed This Action.

For purposes of the statute limitations set forth in section 340.6, "Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions."[17] "[T]he *fact* of damage rather than the *amount* is the relevant consideration. [Citation.] In addition, the character or quality of the injury must be manifest and palpable. 'The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – does not suffice . . . .' [Citations.]"[18] "An existing injury is not contingent or speculative simply because future events may affect its permanency or the amount of monetary damages eventually incurred."[19] "'[T]he determination of the time when plaintiff suffered damage raises a question of fact.' [Citation.] If the material facts are undisputed, the court may, however, resolve the issue of when the plaintiff suffered manifest and palpable injury as a matter of law."[20]

By July 2003, Pamela had received Amy's petition, had retained an attorney to oppose it, and had begun incurring attorney fees for this purpose. By October 22, 2003, Amy had incurred $19,525.16 in attorney fees and costs related to this matter.

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[17] *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 743.

[18] *Adams v. Paul*, *supra*, 11 Cal.4th at page 589.

[19] *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra*, 18 Cal.4th at page 754.

[20] *Adams v. Paul*, *supra*, 11 Cal.4th at page 586.

"[A]ttorney fees incurred as a direct result of another's tort are recoverable damages."[21] But for the wrongful act/omissions alleged in Pamela's malpractice cause of action, Pamela would not have incurred these fees and costs. As part of her damages claim in this action, Pamela seeks to recover the fees and costs she incurred "attempt[ing] to correct the wrongs done by [Weissman]."

Pamela characterizes these fees and costs as a "nominal and trivial damage" which did not trigger the statute of limitations. While $20,000 in fees and costs pales in comparison to the millions of dollars in interests Pamela forfeited under the trust, these litigation costs still constitute a manifest and palpable injury.

By October 2003, at the latest, the statute of limitations began to run on Pamela's malpractice claim against Weissman. By that point, Pamela had discovered or should have discovered the wrongful act or omission alleged in her malpractice cause of action and had sustained actual injury by incurring nearly $20,000 in attorney fees and costs as a direct result of Weissman's alleged malpractice. Pamela did not file this action until December 3, 2004. Thus, Pamela's action is barred as a matter of law by the one-year statute of limitations set forth in section 340.6. The trial court erred in denying Weissman's motion for summary judgment made on this basis.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent superior court to vacate its order of March 3, 2006 denying petitioner's motion for summary judgment,

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[21] *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra*, 18 Cal.4th at page 751.

and to issue an order granting the motion. Petitioner is entitled to recover her costs in this writ proceeding.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J.

ZELON, J.

JOHNSON, J., Concurring.

As reflected in my opinion for the court, under governing interpretations of Code of Civil Procedure section 340.6, we have no alternative but to issue the writ in this case. I write separately to briefly register some concerns about the untenable position in which Pamela MacDonald and like clients find themselves when a lawyer commits an act which may or may not constitute malpractice and may or may not inflict harm depending on the outcome of a future court decision in the underlying action.

To avoid a statute of limitations bar in a malpractice lawsuit against a lawyer the clients must take inconsistent positions in two pending lawsuits. At a minimum, they must file pleadings in two different actions alleging to be true two diametrically opposed positions. Quite possibly, they also will have to argue those two different versions of the facts before the same or different judges. Frequently, they will have to file and argue the malpractice lawsuit -- in this case claiming the lawyer not only erred by failing to file a "safe harbor" petition, but alleging as true this error meant Pamela had violated the no contest clause and thereby suffered serious damages by losing all rights under the trust. Simultaneously, in defending against Amy MacDonald's application, Pamela would be required to allege and prove the opposite position -- she did not have to file a "safe harbor" petition and she had not violated the no contest clause and therefore should lose no rights under the trust.

I question the sense and the fairness of such a system. It wastes judicial time by adding a second lawsuit to the court's caseload. It requires litigants to expend their own resources on a malpractice action and to do so even when they don't think the first lawyer committed malpractice or doubt any malpractice that might have occurred caused serious harm. Finally, it places clients and their lawyers in the ethically and even emotionally uncomfortable position of having to talk out of both sides of their mouths. One day Pamela and her counsel would have to plead or argue or prove it was just fine Phyllis Weissman didn't bother filing a "safe harbor" petition because it was unnecessary to do so. Then the next day they might have to say in the other proceeding Weissman

committed a terrible act of malpractice by not filing that petition and it caused Pamela to lose a fortune.

To make matters worse, although apparently not true here,[1] in many instances the client will be barred by the statute of limitations from even the possibility of a malpractice suit against the second law firm. In appropriate circumstances, not necessarily present here, such a lawsuit might be based on the second firm's failure to take the protective action current law appears to demand -- filing a malpractice case against the first law firm while simultaneously defending the lawsuit occasioned by that first firm's initial malpractice. Barring unusual circumstances, however, a malpractice action against the second firm would be barred in the common situation where the second firm had ceased representing the client -- having lost the defense of the lawsuit resulting from the first firm's malpractice -- more than a year before the client sought to initiate a malpractice action against that second firm. Only an astute or experienced client is likely to realize the possibility of such a lawsuit exists in time to avoid the statutory bar. Thus, most clients will be twice stung by the legal malpractice statute of limitations.

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JOHNSON, J.

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[1] Code of Civil Procedure section 340.6 tolls the statute of limitations while, as was true of the second law firm in this case, that "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (Code Civ. Proc., § 340.6, subd. (a)(2).) In this case, the second law firm was retained to protect Pamela's interests in the estate after the first lawyer failed to take the protective action of filing a "safe harbor" petition and Amy's action capitalizing on that failure ensued. This second firm remained as Pamela's counsel throughout the defense against Amy's lawsuit and indeed throughout the trial and appeal of this action which itself arose out of the same subject matter.